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No. 82-596

IN THE

Supreme Court of the United States

OCTOBER TERM 1982

RUSSELL BUFALINO,

Petitioner,

—against—

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF FOR PETITIONER

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RUSSELL BUFALINO,

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vs.

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REPLY BRIEF FOR PETITIONER, RUSSELL BUFALINO

Argument

I. Speedy Trial Act

The Government's brief in opposition characterizes the decision of the court of appeals as a narrow ruling hinging on the particular facts of this case. To the contrary, the ruling involves the fundamental issue of whether a trial court, under the provisions of the "Speedy Trial Act", is required to effect a prompt disposition of pretrial motions despite inaction by the parties.

The Government argues that the district court could not dispose of the Government's motion to sequester the jury since the court was anxious to hear the Defendants' position on the motion and neither Defendant had filed a response. The argument ignores the fact that the Government's motion was filed on March 27, 1981 and was pending for approximately six

months before the court made any attempt to obtain the Defendants' position on sequestration.

The issue involved here is if the court wanted input from the Defendants on the sequestration motion, did the "Speedy Trial Act" require that he promptly request that input rather than sit back and delay trial for six months while the motion was pending, unanswered.

The prompt disposition language of 18 U.S.C. Section 3161 (h) (1) (f) places a burden on the district court to see to it that pretrial motions are promptly made ripe for disposition. 18 U.S.C. Section 3161 (h) (1) (j) then assures that ripe motions will be determined without undue delay by limiting the excludable period for motions under advisement to thirty days.

If, as here, the district court does nothing for six months to bring a motion "under advisement", then the provision of the "Speedy Trial Act" requiring the court to promptly dispose of pretrial motions has been violated.

When the Act itself contemplates that trial will commence within seventy days after arraignment, there can be little justification for the district court to delay trial for seven months because of a simple unopposed sequestration motion.

The Government's brief makes certain references to the record which require clarification. The Government argues that when, after six months, the district court finally did ask the Defendants for their position on sequestration, counsel for the Defendants informed the court that they had yet to confer on the motion and would state their position later. (Gov't. 13). That statement is simply not true. When on September 30, 1981, the court asked for the Defendants' positions on sequestration, both defense counsel stated unequivocally they had no opposition to the motion. (Pet. App. 12a-13a). The only equivocation was on the part of Rizzitello's attorney and that was with respect

to the court's inquiry as to whether defense counsel would actually join in the Government's request for sequestration. (Pet. App. 13a).

Also, contrary to the statement by the Government, the Defendant's motion to dismiss under the "Speedy Trial Act" was not filed after the court had determined the sequestration motion (Gov't. 4), but rather was filed on September 30, 1981 prior to the disposition of the sequestration motion on October 19, 1981.

Finally, the Government argues that the delay in disposition of the sequestration motion was due to the Defendant's failure to respond to that motion. There is no requirement that a defendant respond to a Government motion he does not oppose. In any event, the Defendant's lack of response to a simple sequestration motion can hardly justify a seven month delay in the disposition of that motion. As stated previously, it was the court's obligation to promptly dispose of the motion despite any inaction by the Defendant. The court of appeals acknowledged that a defendant has no obligation to bring himself to trial and that the responsibility for pursuing a prosecution lies entirely with the Government. (Pet. App. 14a). It was therefore the Government's duty to prosecute its own motion and the record is clear that the Government did nothing with respect to its sequestration motion from the time the motion was filed on March 27, 1981 to the time it was disposed of on October 19, 1981. If the blame for delay is to be placed upon one of the parties, it must be placed upon the Government and not the Defendant.

II. Accomplice Instruction

The Government argues that despite the "somewhat equivocal" and "arguably inadequate" accomplice instruction given by the trial court, the defect was remedied by other "extensive instructions bearing upon the credibility of accomplices." (Gov't. 15).

The fact is, the court gave no instruction relative to the credibility of an accomplice other than that instruction quoted in the petition. (Pet. 13). The Government stated that the jury was alerted to the Fratianno plea bargain, to his grant of immunity, and to the monies he received under the Witness Protection Program. (Gov't. 12). However, there is absolutely no reference to these matters in the court's instructions. Although it is true that evidence was admitted at trial concerning these matters, the court's accomplice instruction in effect commanded the jury to disregard that evidence on the issue of credibility unless the jury found that those benefits were contingent on the outcome of the case, which of course they were not.

The Government argues that the court's general instruction about the possible falsification of testimony by an interested witness was more critical of the accomplice witnesses than the instruction proposed by the Defendant. (Gov't. 15).

However, the Government ignores the fact that the instructions of the district court defined "interest" as "interest in the outcome of the case" and since the only witness with an interest in the outcome was the Defendant, that instruction only served to question the credibility of the Defendant and not the accomplice witnesses. This instruction exacerbated the prejudice already created by the district court's erroneous accomplice instruction.

There is nothing in the record in this case which would distinguish it from the conflicting decision of the Ninth Circuit Court of Appeals in *United States* v. *Bernard*, 625 F. 2d 854 (9th Cir. 1980). In fact, since the error in *United States* v. *Bernard, supra,* merely involved the failure to give an accomplice instruction, while this case involves an accomplice instruction which actually prohibited the jury from considering crucial impeachment evidence, the prejudice created in this case far exceeds that in *United States* v. *Bernard, supra.* The conflict should therefore be resolved.

CONCLUSION

The Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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